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JAMES H. McKENNEY,
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No. 223.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,

v.

THE BITTER ROOT DEVELOPMENT COMPANY ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE NINTH CIRCUIT.

REPLY BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, APPELLANT,
v.
BITTER ROOT DEVELOPMENT COMPANY and others, appellees. } No. 223.

REPLY BRIEF FOR APPELLANT.

Counsel for appellees, in their supplemental brief, urge that the permits are not sufficiently described in the bill, nor the acts which were done under them set forth in detail.

In reply, appellant insists that this is merely matter of evidence, and that the subject-matter is sufficiently referred to in the bill to admit such evidence. Counsel for appellees did not demur because such allegations were insufficient. Their original brief shows they had definite knowledge as to said permits. On page 8, supplemental brief, they say:

> But, conceding that all of appellant's contentions as to these permits are correct, that they were issued, that their contents are before the court, and still, as we submit we have plainly shown in our original brief, no necessity would exist for taking the controversy into a court of equity, as the Government has the clear legal

> right to disregard the permits, charge the defendants as willful tresspassers upon the ground covered by the permits as well as that outside, and require the defendants to come into court and assume the entire burden of proving the issuance of these permits and their compliance with each and every valid condition therein.

But appellant will *not* disregard the permits. From the beginning we have persistently urged them, but the court below ignored them and treated appellees as willful trespassers and liable not in equity but at law for unliquidated damages.

Appellant has always conceded that equity can not be invoked if the bill simply presents a case to recover unliquidated damages, nor if it clearly appears from the bill that a full, complete, and adequate remedy can be had at law. The gist of this case is the question as to whether, under the circumstances, appellant has an adequate remedy at law. The fact that there is a legal remedy is not the criterion. The legal remedy, both in respect to its final relief and its modes of obtaining the relief, *must be as efficient* as the remedy in equity or else the concurrent jurisdiction attaches. We base our right in equity on the principle recognized by this court in *Oelrichs* v. *Spain*, 15 Wall., 228, wherein it is said:

> The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, there is an element of trust in the case which, wherever it exists, always confers jurisdiction in equity.

Appellant claims that this case also comes under the rule in *Tyler* v. *Savage*, 143 U. S., 79. That was a case where the bill set out a case of fraud practised upon the plaintiff. Held, that there were in the case, as ingredients to support the jurisdiction of equity, discovery, account, fraud, misrepresentation, and concealment. Appellant claims all of these in this case and also trust *ex malificio* and prevention of multiplicity of suits.

Appellant also relies on the rule stated by Pomeroy in his third edition Eq. Jur., at section 181, as follows:

> If the controversy contains any equitable feature or requires any purely equitable relief which would belong to the exclusive jurisdiction, *or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it*, the court may go on to a complete adjudication, and may thus establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its authority.

It is objected that we are not entitled to discovery because answer under oath is waived and no interrogatories are propounded, and appellees cite *Huntington* v. *Saunders*, 128 U. S., 78. Our answer is that given in the case of *Maulay* v. *Mickle*, 55 N. J. Eq., 567, which in substance is this: That the language of this court, in that case, must be read in the light of the fact that the bill did not state a cause for equitable relief.

> The waiver by plaintiff in his bill, under equity rule 41, of an answer on oath is not a

waiver of his right to a full answer and full discovery from the defendant. The only change made in the practice of the High Court of Chancery of England by the provision of our equity rule allowing a waiver of an answer on oath is to deprive the answer of any force as evidence in favor of the defendant.

In order to compel discovery from the defendant it is not necessary that the bill should contain specific interrogatories; if the bill contain a general requirement that the defendant shall answer its allegations and charges with their attendant circumstances, that will be sufficient.

Bates Fed. Eq. Proc., Vol. I, pp. 128–132, and cases there cited.

Appellant admits that at the time it drew its bill it did not have in its possession many of the facts and circumstances which it now has, and therefore the bill as originally drawn is not as full and complete as it could now be made. If the court sustains the bill, an amended bill will be filed. If the court decides that the lower courts were right in decreeing that the bill should be dismissed, we then ask that, in accordance with the rule in such cases, the bill be dismissed without prejudice to the filing of a new bill.

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